

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLANT**

77-1162

In The
United States Court of Appeals
For The Second Circuit

PUBLIC SERVICE MUTUAL INSURANCE CO.,
Appellant-Surety,

-and-

ANTHONY CATINO, THERESA PEDUTO, MARY
MARICCIO, and JERRY DE FEO,
Appellants-Indemnitors,

-and-

ALFRED CATINO,
Defendant,

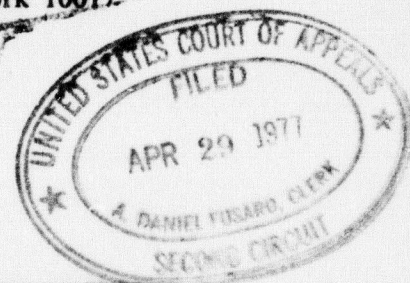
vs.

UNITED STATES OF AMERICA,
Appellee.

BRIEF FOR APPELLANT-SURETY

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UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

UNITED STATES OF AMERICA,

Docket #77-1162

-against-

ALFRED CATINO,

Defendant-Appellant,

and

PUBLIC SERVICE MUTUAL INSURANCE
COMPANY,

Respondent-Appellant.

SURETY'S BRIEF ON APPEAL

This is an appeal by the surety, Public Service Mutual Insurance Company, from the order and opinion of District Judge Milton Pollack entering a judgment of forfeiture in favor of the government against the surety with respect to the bond in question.

Because of the novelty of the issue of law posed by this appeal, the District Court stayed its own judgment, pending the decision of this court.

The bond in question is an appearance bond no. 90B20211 in the sum of \$50,000.00 posted by the surety on September 28, 1973, at the time of the arrest and arraignment of the defendant, Alfred Catino in the District Court for the Southern District of New York.

STATEMENT OF FACTS

At all times during the trial, Catino was admitted to bail on the strength of the bond in question. At the trial he was convicted of violating the narcotic laws. He appeared for sentencing on February 26, 1974, at which time Judge Pollack imposed a twelve year prison sentence. After sentence was imposed, Judge Pollack admitted Catino into bail, pending appeal, in the same sum of \$50,000.00. At no time did the District Court or the United States Attorney ever require that the bond be re-written, or that a new bond be posted. Catino walked out of the court room, and apparently was never seen again. He lost his appeal in this court (U. S. vs. Mallah, 503 F. 2d, 971), and he did not surrender when directed to do so.

Two years later, in February, 1977, the government moved for a judgment of forfeiture as against the surety. The District Court granted the judgment of the government, and this appeal followed.

The surety filed opposing affidavits in the District Court proceeding, which affidavits contained an offer of proof and other factual assertions. The District Court rejected the offer of proof, and did not direct the holding of the evidentiary hearing. As such, at this time, we have to consider these affidavits and offers of proof as being factually correct. The surety, Abraham Newman, who is the agent for the insurance company which posted the bond in question, stated in part in his affidavit:

"I have been in the bonding business for more than forty years, and have posted thousands of bonds in the United States District Courts. As such I am fully familiar with the surety bonding business, and more particularly the bail bonding business. My company uses two standard form bonds in connection with federal criminal matters. One bond is used to secure the appearance of the defendant in the District Court for purposes of trial. The second standard form bond is used to assure the appearance of a defendant who has been admitted to bail, pending appeal, in the United States Court of Appeals. The language of both bonds differs.

"I have written hundreds, and perhaps thousands of appeal bonds, many times involving defendants whose bond I wrote to assure their presence at the trial in the District Court. An appeal bond is a new bond, and is not a continuation of the existing trial bond.

"In the Southern District of New York the following procedure is followed. My office delivers a power of attorney to the office of the clerk of the District Court. The clerk's office has a separate section entitled "Orders and Appeals", which is staffed by Mr. Eddie Aponte and Michael Guranich. The clerk's office types the appeal bond and sends it to the United States Attorney's Office for approval. Then the clerk's office files the appeal bond after it has made arrangements with the United States Marshal to have the defendant present.

"In many instance I will not write an appeal bond even though I have written a trial bond. The risk is much greater on an appeal bond, and many times I will not assume that additional risk, either with or without additional collateral. A defendant in the District Court is presumed innocent, and he knows well that even if he loses, he will still have another opportunity in the Court of Appeals. The defendant on appeal is no longer presumed to be innocent, and he knows that if he loses his appeal, he has no choice but to surrender.

"My company wrote the bond in question to secure the appearance of the defendant in the District Court. He appeared for the trial and for the sentencing. I did not rewrite the trial bond, or in any way consent to its enlargement, modification, extension or change. I did not write an appeal bond for the defendant."

"As far as I am concerned, I met every obligation of this particular bond by having the defendant appear for trial and for sentencing. My obligation on this particular bond ceased on February 26, 1974 when he was sentenced."

The affidavit of this particular attorney, which was submitted to the District Court as counsel for the surety, contained the following offer of proof, which this attorney was prepared to present at an evidentiary hearing in the District Court. In this regard, it reads as follows:

"Eddie Aponte has been in charge of the clerk's office, with regard to orders and appeals, for the past few years. In this regard, he is assisted by Michael Guranich. Both Aponte and Guranich told me that an appeal bond is a separate and distinct bond from a trial bond. An appeal bond must be executed through their office if a defendant is to be admitted to bail pending appeal. A standard form appeal bond is used which differs substantially from a standard form trial bond. The procedure is that the bonding company forwards a power of attorney to Aponte's office. Aponte and his staff then type an appeal bond, which bond must be approved by the United States Attorney. Before the bond is filed, the United States Marshal is directed to bring the defendant to the court, where the clerk then advises the defendant of the terms and conditions of the appeal bond.

"Aponte and Guranich have advised me that this procedure has been followed over the years in hundreds, even thousands of cases. This is the only procedure by which a defendant may be admitted to bail, pending appeal."

The bond executed by the surety on behalf of the defendant, Alfred Catino, is set forth in its entirety as an appendix to the opinion of Judge Pollack. Judge Pollack quotes from one provision in that particular bond, in which it is stated:

"It is agreed and understood that this is a continuing bond which shall continue in force and effect until such time as the (surety is) duly exonerated."

The standard form appeal bond used by the Southern District of New York for appeals to this court has been attached to the opposing affidavit of this attorney, which was filed in the District Court. In part, the language of that appeal bond is as follows:

"Now, the conditions of this recognizance are such, that if the said (defendant-appellant) shall appear either in person or by attorney in the United States Court of Appeals for the Second Circuit when said cause is reached for argument or when required by law or rule of said United States Court of Appeals and from day to day thereafter in the said United States Court of Appeals until said cause is finally disposed of, and shall abide by and obey all orders made in said cause, and shall surrender himself in execution of the judgment and sentence appealed from upon such day as the District Court of the United States for the Southern District of New York may direct, then this recognizance to be void"

In his opinion, in relevant parts, Judge Pollack stated:

"It seems beyond cavil that Catino's failure to surrender to begin serving his sentence as ordered following the denial of his appeal was a breach of the conditions of the bond.

The instant motion appears to raise a novel question in the federal courts. Its resolution however is facilitated by the express stipulation in the surety bond that 'it is agreed and understood that this is a continuing bond which shall continue in force and effect until such time as the surety is duly exonerated.

Leaving the bond effective during the period of the appeal with no modification thereof; pursuant to the continuing bond provision, the bond remained in force in the absence of some prior act of exoneration.

Here, however, the bond explicitly stated that it was to remain effective until the surety was exonerated, and there was no exonerating act prior to the principal's violation of the bond's conditions."

POINT ONE

THE AFFIDAVITS AND OFFER OF
PROOF OF THE SURETY'S AGENT
AND CLERK OF THE DISTRICT COURT
SET FORTH THE ESTABLISHED
PRACTICE AND PROCEDURE OF THE
DISTRICT COURT WITH REGARD TO THE
POSTING OF BONDS PENDING APPEAL

At this time, inasmuch as the District Court declined to hold an evidentiary hearing with regard to the offer of proof by the surety with respect to the practices and procedures followed by the District Court with respect to the posting of appeal bonds, the affidavits and the offer of proof must be accepted as true. This practice and procedure is not just the practice of the clerk's office; it is the practice and procedure of the District Court and its many District Judges. The function of the clerk's office is to carry out the policy and procedure of the District Court and the District Judges. As such, the Deputy Clerk, Eddie Aponte is not stating what he personally developed for the court as a matter of practice. He is prepared to testify as to what the court developed for itself, with regard to the posting of appellate bonds, and had its clerk's office implement.

Furthermore, the offer of testimony of the deputy clerk, Eddie Aponte, and the surety, Abraham Newman, provide the full context in which the trial bonds and the appeal bonds are to be interpreted. The practice and procedure do not change the language

of the bond, as Judge Pollack would have us believe. The practice and procedure throws light on what was intended by the District Court, when the judges adopted the standard form trial bond and the standard form appeal bond. As Aponte was prepared to testify that this practice was followed in every single case in the Southern District of New York over a period of years, it is apparent that Judge Pollack was deviating from very well established norms of practice and procedure. These practices over the years were carried out by every single District Judge, including Judge Pollack himself on other occasions.

It is unfortunate that both Judge Pollack and the United States Attorney allowed the defendant Catino to leave the court room on the day of sentencing, without posting a new appeal bond. It is obvious that both the District Judge and the government counsel just forgot to do that which they have done in countless instances on other occasions. Unfortunately, both forgot, so that one was not available to remind the other. The omission of both should not end up costing the surety \$50,000.00. The surety was not a party to their omission. He had produced the defendant Catino for sentencing and surrender. Judge Pollack should have remanded Catino right then and there. United States marshals were present in the court room to carry out the order of remand of Judge Pollack. Catino's appearance in the court room that day was every bit a surrender, as contemplated by the appearance bond. It was the exonerating act, as set forth by the bond. However,

Judge Pollack took it upon himself to release the defendant without requiring the posting of an appropriate bond.

It is obvious from reading a trial bond that that bond serves the purpose of securing the defendant's appearance solely at the trial. A reading of a standard form appellate bond, as used by the Southern District of New York and this court, in thousands of instances, shows that that bond, and that bond alone, is the only bond by which a defendant may be admitted to bail pending appeal. The offer of testimony of both Aponte and Newman corroborates the meaning and significance of the appellate bond and the trial bond, which bonds were adopted by the judges of the Southern District of New York.

POINT TWO

THE BOND WAS EXONERATED WHEN THE DEFENDANT APPEARED FOR SURRENDER AND SENTENCING IN THE DISTRICT COURT

The defendant surrendered to the District Court when he appeared for sentencing and surrender in February, 1974. At the time of the imposition of sentence, several United States marshals were in the court room and were prepared to whisk away the defendant, just as quickly as the District Judge would pronounce the magic words "remand". However, the District Court never did direct the remand

of the defendant, and allowed Alfred Catino to walk out of the court room without posting a new bond. At that same time, the defendant Catino was filing a notice of appeal to this court. With the filing of that notice, the District Court lost jurisdiction of the case, and jurisdiction was transferred to this court. At that point of time, the District Court did not provide for an appropriate bond that would meet the jurisdiction of this court. In that regard, the District Judge was remiss, and the surety should not be called upon to pay for the errors and omissions of the District Court.

The cases cited by the District Court in its opinion deals with situations which remained always District Court situations, and never involved an appeal to the Court of Appeals. In United States v. Miller, 539 F. 2d 445, 449 (C. A. 5 1976), United States v. Gonware, 415 F. 2d 82 (C. A. 9 1969), and United States v. Wray, 380 F. Supp. 1186 (1975) all involved situations where the District Court, while retaining jurisdiction of the case itself, allowed the defendant to have a few additional days after sentencing before requiring surrender. In those instances, the District Court never lost jurisdiction of the case, and so the appearance bond was held as security for the appearance of the defendant. This contrasts markedly with our situation where the District Court lost jurisdiction of the case, once the appeal was filed

to the Court of Appeals, and the District Court never took steps to require an appropriate appellate bond for the Court of Appeals.

United States v. Brizuela, 508 F. 2d 386, 387, and more particularly footnote 2, (C. A. 9, 1974) the Court of Appeals recognized the difference between an appeal bond and a trial bond.

Footnote 2 sets forth a standard form appeal bond - just like we use in this court. Obviously that bond had not been posted in the District Court during the pendency of the trial.

In United States v. Kirkman, 426 F. 2d at 747, 751 (C. A. 4, 1970) the Court of Appeals recognized that the purpose of a District Court bond is to assure that the defendant will attend the trial - "The purpose of bail is to secure the presence of the defendant at trial." The Fourth Circuit then cited the decision of the Second Circuit in Nebbia, 357 F. 2d 303.

The discussion of the Second Circuit in United States v. Egan, 394 F. 2d 266, 267 - 268 (C. A. 2, 1968) corroborates our position that any modification in the terms of the bond must be done on reasonable notice to the surety. Furthermore, modification requires a new, properly executed bond or rider, and that the defendant should be remanded until such new or modified instrument is filed. In that regard, this Court wrote (394 F. 2d at 267 - 268):

"Where the court modifies the terms of a bond on its own motion, the Clerk of the Court should give reasonable notice of the change to the government, the defendant, and the surety in advance of the effective date of the modification in order that the parties may be heard or the surety may take any steps it deems necessary to surrender the defendant to custody. If the government moves the court from modification of the terms of the bond, it should give reasonable notice of the motion to the defendant and the surety. If the defendant is in custody of the surety who moves for a modification of the bail terms, as in the present case, the surety must look to the defendant for notice on the motion or discover it itself from checking the court docket. Regardless of who the movant may be, if the court orders a material modification of the terms of the bond, the defendant must immediately post a new properly executed bond, or a rider similarly executed for attachment to the old bond, containing the amended conditions. If such an instrument is not filed forthwith, the court must order the defendant held in the custody of the Attorney General until such a bond is furnished."

In United States v. D'Anna, 487 F. 2d 899 (C. A. 6, 1973), the Court of Appeals noted that "in interpreting a bond contract, the language must be strictly construed in favor of the surety", at page 901. Forfeiture by the District Court was set aside by the Court of Appeals for the surety had not consented to extension of the bond to cover delay in commencing ^{service of} sentence granted by the court. The Court of Appeals noted that after sentence "the risk of flight is substantially increased, a risk clearly not contemplated at the time of the execution of the instant bond." At page 901.

CONCLUSION

The decision and order of the District Court should be reversed, for it is contrary to the well established practice and procedure of the Southern District of New York, and it is contrary to the language and purpose of the bond itself. In the alternative, the matter should be remanded to the District Court for an evidentiary hearing to fully develop the factual basis and context of the posting of appeal bonds in the District Court.

Dated: New York, New York

April , 1977

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FEDERAL COURT - SECOND CIRCUIT

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- and -
ANTHONY CATINO, THERESA PEDUTO, MARY MARICCIO, and
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Affidavit of Personal Service

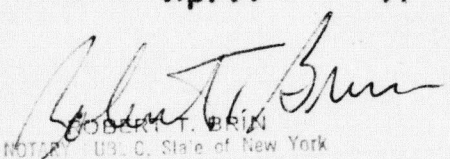
STATE OF NEW YORK, COUNTY OF **New York**

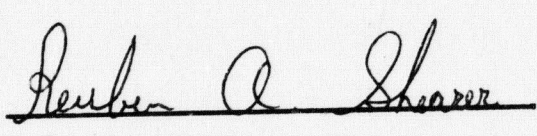
SS.:

I, Reuben A. Shearer, being duly sworn, depose and say that deponent is not a party to the action, is over 18 years of age and resides at 211 West 144th Street, New York, New York 10030.

That on the **29th** day of **April** 19 **77** at **1 St. Andrews Plaza**
N.Y. N.Y. deponent served the annexed **Appellate & Brief** **2) 401 Broadway NYC** upon
Robert Fiske Jr. U.S. Attorney **2) Jeffrey Weissfeld**
the **Appellee** in this action by delivering a true copy thereof to said individual
personally. Deponent knew the person so served to be the person mentioned and described in said
papers as the **attorney** herein,

Sworn to before me, this **29th**
day of **April** 19 **77**


ROBERT T. BRIN
NOTARY PUBLIC, State of New York
No. 31-0418950
Qualified in New York County
Commission Expires March 30, 1979


Reuben A. Shearer

